



June 19, 2019

VIA CM/ECF

The Honorable Lyle W. Cayce
U.S. Court of Appeals, Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: Joint Supplemental Letter Brief of Non-State Petitioners and Petitioner-Intervenors Addressing Stay, *Texas, et al. v. EPA, et al.*, Case No. 16-60118

Dear Mr. Cayce:

In response to the Court's letter dated June 4, 2019, Non-State Petitioners and Petitioner-Intervenors¹ file this joint letter addressing whether the stay for this case should remain in effect and whether the U.S. Environmental Protection Agency ("EPA") should continue to provide 60-day status reports. Non-State Petitioners and Petitioner-Intervenors request that the stay of this case, as well as the stay of the underlying rule² entered by the Court, remain in effect and that EPA be required to continue to submit periodic status reports to the Court. Non-State Petitioners and Petitioner-Intervenors take no position on whether the intervals for status reports should remain at 60 days or be extended to 90 days, as EPA is requesting.

This case involves petitions for review of a final EPA rule that addresses requirements of the Regional Haze program of the Clean Air Act ("CAA") with respect to the States of Texas and Oklahoma. 81 Fed. Reg. 296 (Jan. 5, 2016) ("Final Rule"). EPA's Final Rule imposed stringent emission limitations on fourteen electric generating units in Texas. The limits, according to EPA, would require installation of new emission controls for sulfur dioxide ("SO₂") (called "scrubbers") on seven units and would require upgrading existing scrubbers on seven additional units. Although a

¹ The Non-State Petitioners and Petitioner-Intervenors that are joining in this letter are listed on the signature page below.

² 81 Fed. Reg. 296 (Jan. 5, 2016).

few of these generating units have retired since the case was initiated, the majority of them continue to operate and provide critical power to the Texas electricity grid to ensure its reliability.

Following extensive briefing and oral argument, on July 15, 2016, this Court issued a published opinion that granted Petitioners' motions to stay the Final Rule "in its entirety" pending judicial review, "including the emissions control requirements." *Texas v. EPA*, 829 F.3d 405, 435-36 (5th Cir. 2016) ("Stay Order"). The Court concluded that Petitioners were likely to succeed in establishing that EPA's state implementation plan ("SIP") disapprovals and federal implementation plan ("FIP") in the Final Rule are unlawful for four separate reasons. *Id.* at 428-33. Subsequently, EPA sought "voluntary remand of the Final Rule's SIP disapprovals and FIPs so that it may reconsider those actions in light of the discussion regarding likelihood of success on the merits set forth in the [Stay Order]." Doc. 00513783027 at 2. EPA further "consent[ed] to the continuation of the current stay of the remanded portions of the Final Rule." *Id.* at 1.

This Court granted EPA's motion for remand and placed the case in abeyance pending EPA's proceeding on remand. Doc. 00513923068. EPA has submitted status reports to the Court since that time, advising the Court of its progress on remand.

At this time, Non-State Petitioners and Petitioner-Intervenors believe that a continued stay of this case is the most expeditious path for resolving the issues raised in the case, including the issues on which the Court concluded Petitioners were likely to succeed on the merits. As EPA has explained, a related component of the Regional Haze program is the Best Available Retrofit Technology ("BART") requirement. Doc. 00514977349 at 3. Since this case was placed in abeyance, EPA has finalized BART requirements for Texas generating units subject to BART, many of which are the same units at issue in this case. 82 Fed. Reg. 48,324 (Oct. 17, 2017). EPA has also sought public comment on potential revisions to those BART requirements, 83 Fed. Reg. 43,586 (Aug. 27, 2018), and is in the final stages of finalizing any revisions, *see* Doc. 00514977349 at 4. Non-State Petitioners and Petitioner-Intervenors contend that those final BART requirements are sufficient to fully satisfy Texas's reasonable progress obligations and, thus, obviate the need for the emissions limitations in the Final Rule. Were EPA to so conclude during the remand of the Final Rule, it would potentially resolve Non-State Petitioners' claims with respect to the Final Rule.

To ensure that EPA remains on track in its remand proceedings, the Court should continue to require status reports by EPA. Non-State Petitioners and Petitioner-Intervenors take no position on EPA's request to extend the intervals for reports to 90 days.

Further, the stay of the Final Rule entered by the Court on July 15, 2016, should remain in effect and the Court should continue to retain jurisdiction. The irreparable harms found by the Court in its Stay Order—including the “tremendous costs of the emissions controls” and “the threat of grid instability,” *Texas*, 829 F.3d at 433-34—remain a concern if the Final Rule’s emissions limitations were to take effect. Although a few of the generating units subject to the Final Rule have retired, the majority remain in operation and are critical to the reliability of the Texas grid, as noted above.

For these reasons, Non-State Petitioners and Petitioner-Intervenors request that the stay of this case, as well as the stay of the underlying Final Rule entered by the Court, remain in effect and that EPA be required to continue to submit status reports to the Court.

Respectfully submitted,

s/ P. Stephen Gidiere III
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s/ Danica Milios
Counsel for Balanced Energy for Texas and Texas Mining and Reclamation Association

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the court's CM/ECF system which will send notification of such filing to all attorneys of record.

Dated: June 19, 2019

s/ P. Stephen Gidiere III
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